No. 99-1030

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In The
Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA,
AND BART PETERSON, IN HIS OFFICIAL CAPACITY
AS MAYOR OF THE CITY OF INDIANAPOLIS,

Petitioners,

v.

JAMES EDMOND, JOELL PALMER,
ON THEIR OWN BEHALF AND ON BEHALF OF
A CLASS OF THOSE SIMILARLY SITUATED,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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QUESTION PRESENTED

Are traffic checkpoints where motor vehicles are stopped without cause for the primary purpose of looking for evidence of criminal drug violations unlawful under the Fourth Amendment to the United States Constitution?

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STATEMENT OF THE CASE

1. Since August of 1998, the Indianapolis Police Department has conducted drug interdiction roadblocks in the City. (Pet. App. 25a). The roadblocks are operated pursuant to a formal policy entitled "Drug Checkpoint Contact Officer Directives by Order of the Chief of Police." (Pet. App. 53a.) The explicit purpose of the policy is to interdict the flow of unlawful drugs in Indianapolis. (Pet. App. 51a). This is done by stopping vehicles and forcing them to pass through the checkpoint areas. (Pet. App. 53a). The policy provides that officers are not given discretion to stop the vehicles out of sequence and, once selected, the driver must pass through the checkpoint. (Pet. App. 53a-54a). When the driver enters the checkpoint, an officer asks the driver for his or her license and registration. (Pet. App. 53a). The driver is informed that he or she is being stopped at a drug checkpoint. (Pet. App. 53a).

While the vehicle is stopped, officers look for signs of impairment and conduct an open view examination from outside of the vehicle. *Id.* A drug detection dog is walked around and examines every vehicle stopped. (Pet. App. 54a). If consent is given by the person in control of the vehicle, or if probable cause is ascertained by the police, a warrantless search of the stopped vehicle is conducted. (Pet. App. 53a). The policy statement indicates that "[p]robable cause is determined on the basis of whether a reasonable person would believe that seizable objects would be found in the vehicle. An indication from a trained drug detection dog would establish probable

cause." *Id.* The policy further provides that every vehicle must be examined in the same manner "until particularized suspicion or probable cause develops." (Pet. App. 54a).

There are approximately thirty (30) Indianapolis Police Department officers at each checkpoint. (Pet. App. 52a). The City attempts to operate the drug checkpoints so that, absent a search based on probable cause or reasonable suspicion, a driver will be stopped for five minutes or less. (Pet. App. 51a). In the six traffic stops in 1998 conducted before the appeal of this matter, 1,161 vehicles were stopped. (Pet. App. 55a). The police reported 55 drug related arrests "and 49 arrests for conduct unrelated to drugs, such as driving with an expired driver's license." (Pet. App. 3a, 55a).

2. The respondents, James Edmond and Joell Palmer, were stopped in two of the drug interdiction roadblocks and brought a class action lawsuit to challenge what they termed an unconstitutional seizure. (Joint App. 6, 16, 19). The respondents sought, among other things, a class-wide injunction against the roadblocks on behalf of a putative class of similarly situated drivers. (Joint App. 8). The parties thereafter entered into a stipulation as to how the City would operate the roadblocks in the future since the City indicated an intent to continue the practice. (Pet. App. 51a). The parties also stipulated that the case could proceed as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, and the trial court certified a class consisting of motorists who have been or are subject to being stopped at the drug interdiction roadblocks. (Pet. App. 30a-32a).

The respondents sought a preliminary injunction to enjoin the drug roadblocks, and the parties stipulated to all the material facts. (Pet. App. 25a-28a). The district court denied the preliminary injunction and found that the roadblocks did not violate the Fourth Amendment. (Pet. App. 32a-47a). Specifically, the trial court concluded that, although the primary purpose of the roadblocks was to interdict narcotics, the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979), must be used to assess their constitutionality and that under this test the roadblocks were proper. (Pet. App. 33a-35a).[1] The preliminary injunction was therefore denied.

3. On appeal, a divided Seventh Circuit Court of Appeals reversed the trial court. (Pet. App. 1a). Chief

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[1] The district court had noted that although the roadblocks had as a primary purpose the interdiction of drugs, they also had as a secondary purpose the checking of licenses or registrations. (Pet. App. 44a). There is nothing in the record, however, which demonstrates that the actual purpose for establishing the roadblocks had anything to do with a perceived need to check licenses and registrations. Not only is the policy formally named a "Drug Checkpoint" policy, but it makes clear that the sole purpose of the checkpoints is to stop cars so that a determination can be made if there is probable cause to search the car. (Pet. App. 53a). There is no evidence in the record that addresses any perceived need by those who established the program to conduct license and registration roadblocks. All of the evidence before the trial court concerned the City's perceived need to conduct drug roadblocks and to detect evidence of criminal drug activity. As indicated, when individuals are stopped at the checkpoints they are informed only that they are at a "drug checkpoint." (Pet. App. 53a). The fact that the program catches drivers with expired licenses or registrations is obviously incidental to its actual purpose.

Judge Posner, writing for the majority, found that the purpose of the roadblocks was "to catch drug offenders" and that the "program of drug roadblocks belongs to the genre of general programs of surveillance which invades privacy wholesale in order to discover evidence of crime." (Pet. App. 2a, 9a). The court recognized that a seizure for the purposes of general criminal law enforcement must ordinarily be based on individualized suspicion of wrongdoing. (Pet. App. 4a-5a). The court found that an exception to this general rule would apply, for example, if a roadblock were set up to catch a dangerous fleeing criminal or it were set up after police were given reliable information that a car full of dynamite was being driven by a terrorist to downtown Indianapolis. (Pet. App. 5a-6a). However, as the Seventh Circuit also recognized, neither of these exceptions apply in this case. The Seventh Circuit further noted that this Court had allowed random sobriety checkpoints in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), but the concern motivating those seizures was "not primarily with catching crooks, but rather with securing the safety or efficiency of the activity in which the people who are searched are engaged." (Pet. App. 8a). Similarly, the court of appeals distinguished the immigration checkpoints upheld in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), since they depend on the unique power of the federal government "over foreign relations, foreign commerce, citizenship and immigration." (Pet. App. 9a). Unlike immigration or sobriety checkpoints, the court of appeals concluded that the drug roadblocks in this case are designed to "catch drug offenders" and they have "no

regulatory purpose that might be compared to that of immigration laws." (Pet. App. 10a).

The Seventh Circuit acknowledged that the test for the lawfulness of a particular search or seizure is an objective one and the motives of the officers actually carrying out the search or seizure are irrelevant. (Pet. App. 10a). At the same time, the court noted that it was important to look at the purpose behind the program itself. As Judge Posner explained, a constitutional roadblock cannot be a pretext to conduct a search for criminals, but must have an actual regulatory purpose. *Id.* The inquiry into purpose, at the program level, is a valid and necessary method "of identifying and banning the most flagrantly abusive governmental conduct without handcuffing government altogether." (Pet. App. 11a). Since the roadblocks have a general criminal law enforcement purpose, the court of appeals concluded that the trial court had erred in finding that the City's practice was lawful.

Dissenting from the panel's opinion, Judge Easterbrook argued that the purpose of the roadblock policy was not relevant to the Fourth Amendment analysis. (Pet. App. 13a-16a). He rejected the criminal investigatory-regulatory distinction and instead argued that the roadblocks were constitutional because the diminished privacy interests of the drivers and the slight invasion of privacy posed by the roadblocks were outweighed by the aggregate success of the roadblocks and the limited discretion given to the officers handling the roadblocks. (Pet. App. 16a-20a).

SUMMARY OF THE ARGUMENT

I. The stopping of a car at a roadblock is a seizure under the Fourth Amendment. *Michigan Department of State Police v. Sitz, supra; United States v. Martinez-Fuerte, supra.* This Court has always required that a seizure or search be supported by cause to be valid under the Fourth Amendment if its primary purpose is investigation of a crime. In *Sitz* and *Martinez-Fuerte* this Court approved of, respectively, sobriety checkpoints and fixed immigration checkpoints. Both featured suspicionless seizures and are therefore limited exceptions to the general rule that searches or seizures must be supported by individual cause. However, the two cases do not create a "checkpoint exception" to the Fourth Amendment and do not mark a deviation from this Court's consistent holdings that if the purpose of a search or seizure is to discover evidence of criminal activity, it must be supported by cause. Neither *Sitz* nor *Martinez-Fuerte* involved searches or seizures designed to investigate criminal activity. Conversely, the roadblocks here are clearly designed to discover evidence of criminal drug activity. Since these criminal investigatory seizures are not based on cause, they are unconstitutional.

A. This Court has recognized limited exceptions to the requirement that searches or seizures be predicated on cause. However, in each situation warranting an exception, the seizures or searches were not designed to elicit evidence of criminal activity, although criminal activity might be discovered during their course. The first such exception involves administrative or regulatory searches which may, under appropriate circumstances, occur without specific cause. Although these searches

might disclose evidence of criminal activity, their purpose is not to investigate crime but to prevent the development of hazardous conditions or to protect other regulatory interests. Similarly, searches of the property of persons who have been arrested may occur without cause. These inventory searches are not for purposes of criminal investigation, however, but are designed to advance non-investigatory interests. Also within the well-recognized exception to the cause requirement are drug tests based on special governmental needs separate from criminal investigation.

Immigration checkpoints fall within the non-criminal investigatory model as well. Prior to *Martinez-Fuerte*, immigration checkpoints were recognized as being undertaken primarily for non-prosecutorial purposes as part of the federal government's acknowledged interest in protecting its sovereign territory. Nothing in *Martinez-Fuerte* alters that view or the Fourth Amendment analysis that flows from it. The Court in *Martinez-Fuerte* found that the fixed checkpoints could be undertaken without cause after employing a balancing test that weighed the interest of the government against the privacy interest of the citizen. But, the validity of that balancing test rested on the Court's recognition that the government's interest was not to investigate criminal activity, but to safeguard our borders and to minimize illegal immigration.

The balancing test used in *Martinez-Fuerte* was formalized in *Brown v. Texas, supra*. However, this Court has never applied the *Brown* balancing test when the challenged search or seizure was for the purpose of investigating and prosecuting criminal activity. Thus, the sobriety checkpoints in *Sitz* were not designed for the

investigation of criminal activity; rather, they were viewed by this Court as non-criminal, safety-related inspections designed to remove from the road imminently dangerous drivers and their vehicles. Thus, *Sitz* merely conforms to this Court's existing precedents allowing non-cause based seizures or searches if the purpose of the search or seizure is not to investigate potential criminal activity.

B. The subjective intent of an individual officer is irrelevant under the Fourth Amendment if there is objective cause to believe that a violation of law has occurred. However, in a search or seizure which is not based on cause, programmatic purpose must be examined to determine if a suspicionless search or seizure, characterized as non-investigatory, is actually an unconstitutional attempt to conduct a criminal investigation.

C. The City's argument in favor of these roadblocks essentially serves to create a new exception to the Fourth Amendment for checkpoints because of the serious concerns that drugs pose in America today. However, this Court has repeatedly rejected that approach to Fourth Amendment law, most recently when the Court refused to create a "firearms exception" to stop-and-frisk rules earlier this Term in *Florida v. J.L.*, ___ U.S. ___, 120 S.Ct. 1375 (2000). As the Court has recognized, such exceptions would quickly undermine the core requirement of cause embodied in the Fourth Amendment and would quickly undermine the Fourth Amendment itself. There simply is no valid reason for the Court to back away from its consistent position that criminal investigatory seizures and searches may occur only after some quantum of cause is present.

D. The Indianapolis roadblocks are concerned with one thing, and only one thing – the discovery of evidence of criminal drug activity. The roadblocks do not protect the public safety on the roadways as do vehicle inspections and sobriety checkpoints. The purpose of the roadblocks is to find probable cause to conduct searches to discover unlawful drugs. Although the City claims that there is a secondary purpose for the roadblocks, to regulate public safety through license and registration checks, there is nothing in the record, other than the fact that licenses and registrations are checked while plain view inspections are done and drug detection dogs sniff each car, to support a claim that the City is actually interested in anything but drug interdiction. The City has not attempted to demonstrate that the standards of *Brown v. Texas* are met with regard to any secondary purposes related to traffic safety. It is indisputable, therefore, on the record before the Court, that the sole programmatic purpose of the roadblocks is to look for drugs. The roadblocks are therefore unconstitutional because they are not supported by cause.

II. Even if the *Brown* balancing test were to be applied to the drug interdiction features of the roadblocks, they would be found unconstitutional. These roadblocks rely on a large police presence and dogs circling each car. As a result, they represent a much greater intrusion, both subjectively and objectively, on law abiding motorists who are unfortunate enough to be stopped than the roadblocks in either *Sitz* or *Martinez-Fuerte*.

ARGUMENT

I. THE CITY'S DRUG INTERDICTION ROADBLOCKS ARE UNCONSTITUTIONAL SINCE THEY HAVE AS THEIR PRIMARY, IF NOT SOLE, PURPOSE THE INTERDICTION OF UNLAWFUL DRUGS

The stopping of a car at a roadblock is a seizure under the Fourth Amendment. *See, e.g., Sitz*, 496 U.S. at 450; *Martinez-Fuerte*, 428 U.S. at 556. The Fourth Amendment arose out of an English and colonial history of general searches without any specific cause. *See generally*, Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U.L.Rev. 925, 939-950 (1998). From this history of abusive, non-cause based searches, came the desire of the Founders to enact a prohibition that would ensure the right to be free from unreasonable searches and seizures. *Id.* Searches and seizures without cause are thus presumptively unconstitutional. "[T]o accommodate the interests protected and advanced by the Fourth Amendment some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." *Martinez-Fuerte*, 428 U.S. at 560.

Although this Court has allowed, in limited circumstances, certain seizures or searches to occur without individualized cause, it has consistently ruled that individual suspicion must be present if a search or seizure is designed for the primary purpose of criminal investigation. Because the drug roadblocks in this case were designed for the primary, if not exclusive, purpose of criminal investigation, they cannot be constitutionally justified without erasing the clear and critical line between criminal and non-criminal stops and searches

that this Court has repeatedly drawn in its Fourth Amendment case law.

A. This Court has removed the cause requirement only if the search or seizure is not designed to disclose evidence of criminal activity, even though such disclosure may be a by-product of the search or seizure

A search or seizure must generally be based on some degree of specific cause to be constitutional. Since 1967, this Court has recognized limited exceptions to this general rule. Each exception is characterized by the fact that the seizures or searches were not designed to elicit evidence of criminal activity, although criminal activity may have legitimately been discovered during the search or seizure. That fact is essential to understanding this Court's jurisprudence, and it is dispositive in this case.

1. Administrative and regulatory searches

In *Camara v. Municipal Court*, 387 U.S. 523, 531 (1967), administrative inspections to enforce building codes were upheld based on administrative warrants which were not supported by specific cause. In doing so, the Court recognized that violations of the codes in question could be criminal violations as well. *Id.* However, the Court also recognized that the search was not a criminal investigatory search:

> Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with

> minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety.

Id. Even though cause was not required, moreover, Fourth Amendment interests were safeguarded by the requirement that an administrative warrant be obtained. 387 U.S. at 538-39.[2]

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[2] The City argues that *Camara* rejected the distinction between regulatory searches and criminal ones. (Petitioner's Brief at 28, n. 4). Yet, *Camara* clearly holds that an administrative search without individual suspicion is appropriate, whereas a search for criminal investigatory purposes is not, despite the fact that the administrative search may turn up evidence of criminal violation. 387 U.S. at 531. The notion that a regulatory, as opposed to a criminal investigatory, search does not have to be supported by cause was accepted at the time of the adoption of the Fourth Amendment. Thus, in *United States v. Villamonte-Marquez*, 462 U.S. 579, 593 (1983), this Court found that customs officials were allowed, without cause, to board vessels to review the vessel's documents and manifest in furtherance of the government's interest in "assuring compliance with documentation requirements." The Court noted that the current statute allowing such an inspection is a direct descendant of the Act of August 4, 1790, ch. 35, 1 Stat. 145, § 31. 462 U.S. at 584. The immediate predecessor of the 1790 statute was the Collection Act of 1789, ch. 5, 1 Stat. 29, *repealed by* Act of August 4, 1790, ch. 35, § 74, 1 Stat. 145, 178, which also allowed inspectors to board ships when they arrived in port and allowed them to check inventory to create an administrative record so that, when the goods were unloaded, duties could be imposed. Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1739-40 and note 113 (1996) (reviewing WILLIAM JOHN CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING). As one commentator has explained, these inspections "would be classified today as administrative

Although *Camara* required the issuance of an administrative warrant, subsequent cases have emphasized that there are times when a search may occur pursuant to a regulatory or administrative scheme, even without a warrant. Thus, in *Michigan v. Tyler*, 436 U.S. 499 (1978), the exigency of the need to fight a fire was deemed to be sufficient to allow the warrantless entry of fire officials into a building and to allow them to remain there for a reasonable time after the blaze was extinguished in order to investigate the cause of the fire. 436 U.S. at 512. However, the *Tyler* Court also emphasized that if officials concluded that there was probable cause to believe the fire was arson, a warrant would have to be obtained for further searches under the traditional probable cause standard. *Id.* The limited nature of this exception from the cause requirement was reemphasized in *Michigan v. Clifford*, 464 U.S. 287 (1984), where the Court drew a clear distinction between the search of a fire scene to discover evidence of arson and the search of a fire scene to determine the cause of the fire. The former is an investigatory search that requires a criminal search warrant based on probable cause; the latter is a regulatory search that can be supported by an administrative warrant issued without individualized cause. 464 U.S. at 294. The difference

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searches and seizures, and required neither warrants nor particularized suspicion." *Id.* at 1740. By contrast, another portion of the 1789 Act provided that a warrantless search of ships could occur only if customs officials had reasonable suspicion that taxable property was concealed which would be a violation of law. *Id.* at 1740-41 and at n. 118. This corresponds to the modern day search or seizure for criminal investigatory purposes.

between investigatory and regulatory invasions of Fourth Amendment interests has been crucial to the Court, and it is crucial here.

2. Inventory searches

In *South Dakota v. Opperman*, 428 U.S. 364 (1976), this Court found that inventory searches following the lawful seizures of automobiles were not unconstitutional, even though the searches are done without specific cause and without a warrant. The Court noted that these searches were not motivated by a criminal investigatory purpose, but were instead designed for the non-investigatory purposes of protecting the owner's property, protecting the police from claims that property had been lost or stolen, and protecting the police from potential danger. 428 U.S. at 369. "The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures . . . The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions . . . " 428 U.S. at 370, n. 5.

The Court noted that the inventory search in *Opperman* was reasonable since it was done pursuant to standard police procedures. However, the Court reiterated that this standard police procedure must be related to the inventory search and not be related to a search for evidence of wrongdoing. Likewise, in *Colorado v. Bertine*, 479 U.S. 367, 376 (1987), the Court upheld an inventory search of an arrestee's backpack that was permitted, but not required, by police regulations. The inventory search did not violate the Fourth Amendment, the Court ruled, as

long as the police discretion "is exercised according to standard criteria and on the basis of something other than suspicion of criminal activity." *Id.* In this area, as well, the Court has drawn a bright line between criminal investigatory and non-investigatory searches and seizures.

3. Special needs drug testing

A clear demarcation between criminal investigatory searches and seizures, which require cause, and non-criminal ones, which do not, can also be seen in the special needs drug cases. Beginning in *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989), this Court has held that there are certain situations in which public entities may require individuals to submit to suspicionless drug tests. *See also, Vernonia School District 47 J v. Acton*, 515 U.S. 646 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). The Court stated in *Skinner* that suspicionless drug testing could be allowed when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." 489 U.S. at 619 (internal quotation marks and citation omitted). To determine if the suspicionless testing could be justified, the Court employed a balancing test which looked at the interests of the government, the nature of the intrusion, and the privacy interests implicated. 489 U.S. at 417-22. But, the seizure and search under the Fourth Amendment could only legitimately take place if it was designed for a purpose other than normal law enforcement and, even

then, there are limits on who may be subject to such tests. *See, Chandler v. Miller*, 520 U.S. 305 (1997).[3]

4. Immigration checkpoints

In *Martinez-Fuerte*, the Court permitted immigration checkpoints which had as their purpose the brief stopping of vehicles to determine compliance with immigration laws. The Court recognized that the stopping of the vehicles were seizures that had to be justified under the Fourth Amendment. 428 U.S. at 558. However, after employing a test that balanced the individual's privacy interests and the imposition on those interests against the government's need for the seizure, the Court found that the roadblocks could occur even though not supported by individual suspicion. 428 U.S. at 562.

The City argues that *Martinez-Fuerte* stands for the proposition that a checkpoint can occur if the needs of the government balanced against the invasion of the privacy interest of the citizen tips in favor of the government. However, the City's argument ignores the fact that *Martinez-Fuerte* focused on the purpose behind the proposed stops, which the Court described as "legitimate and in the public interest . . . " *Id. Martinez-Fuerte* arose in the particularized context of immigration control where the

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[3] In its Brief, the City seems to argue that the special needs cases are not relevant here since they deal with searches and not "low-intensity" seizures. (Petitioner's Brief at 27). It is true that the special needs cases concern searches. But, even in "low-intensity" seizures, this Court has always required at least reasonable suspicion if the seizure is for the purpose of criminal investigation. *Terry v. Ohio*, 392 U.S. 1 (1968).

government's overriding interest is in preserving the integrity of its borders. It is true that those who violated the border controls were subject to arrest and prosecution, just as those who violate other regulatory rules of the state may be subject to arrest and prosecution. But what distinguishes regulatory searches or seizures from criminal ones is that criminal prosecution is not the principal or ultimate goal of the program. Those caught in the roadblocks in *Martinez-Fuerte*, whether prosecuted or not, had committed crimes, but the purpose of the checkpoints was to "minimize illegal immigration" and most illegal aliens who were caught were simply deported. 428 U.S. at 552, 553, n. 9.[4]

This Court has long recognized the distinction between stopping a vehicle without cause, in the hope of finding evidence of criminal activity, and stopping persons "crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in . . . " *Carroll v. United States*, 267 U.S. 132, 153-54 (1925).[5] As

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[4] It is also true, as noted by the United States (Brief of the United States at 20) that the checkpoints in *Martinez-Fuerte* took place some distance from the border. However, this does not change the fact that they are maintained to intercept illegal immigrants. ("Traffic-checking operations in the interior apprehended approximately 55,300 more deportable aliens.") 428 U.S. at 553.

[5] The Court in *Martinez-Fuerte* recognized that the stopping of vehicles at immigration checkpoints was similar to stopping vehicles on the highways to check for valid licenses and compliance with other safety requirements. The latter stops were deemed to be "administrative," although this characterization did not serve to determine if the stops were too

Justice Powell had noted three years prior to *Martinez-Fuerte*, immigration checkpoints are "undertaken primarily for administrative rather than prosecutorial purposes." *Almeida-Sanchez v. United States*, 413 U.S. 266, 278 (1973) (Powell, J., concurring). After *Martinez-Fuerte*, the Court has continued to recognize that there is a significant difference under the Fourth Amendment between an inspection designed to elicit evidence of criminal activity and the authority of the United States to conduct a search or seizure based "on its inherent sovereign authority to protect its territorial integrity. By reason of that authority, it is entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry." *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 473 (1979). Thus, in *Torres*, the Court found unconstitutional a search of luggage that had occurred without cause and that was based on a Puerto Rico statute allowing police to search the luggage of any person arriving from the United States. The immigration search exception could not apply, the Court held, since Puerto Rico, a territory of the United States, "has no sovereign authority to prohibit entry into its territory." *Id.*[6]

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intrusive, a question the Court declined to answer. 428 U.S. at 560, n. 14. This footnote does not, as argued by the United States, represent a rejection of the distinction between searches and seizures for the purposes of criminal investigation and those for other, non-criminal purposes. (Brief of the United States at 20). It merely acknowledges that the immigration stops are administrative in nature.

[6] The City asserts that the Seventh Circuit misread *Martinez-Fuerte* by indicating that the decision relied on Congress' authority over the regulation of foreign commerce,

The immigration cases therefore do not provide that a balancing test is to be used to judge the constitutionality of all searches or seizures. Rather, this balancing test applies only if the aim of the immigration program is not directed at criminal law enforcement.

5. Drunk driving roadblocks and traffic safety checkpoints

In *Delaware v. Prouse*, 440 U.S. 648 (1979), this Court suggested that states could operate traffic checkpoints, featuring suspicionless stopping of vehicles, in a constitutional manner if they were designed for the regulatory, non-investigatory purpose of insuring traffic safety through checking driver and vehicle compliance with licensing, registration and inspection requirements. All these requirements, the Court observed, "are essential elements in a highway safety program." *Id.* The Court nonetheless found that the random stopping of Mr. Prouse was unconstitutional since it had not been done pursuant to a neutral plan, and had not been done in a roadblock setting where officer discretion was circumscribed and where the invasion of privacy interests was minimized.

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citizenship and immigration. (Petitioner's Brief at 25). Nowhere did the Seventh Circuit imply or state that Congress' immigration power allowed an overriding of the Fourth Amendment. Instead, the Seventh Circuit correctly found that Congress' authority in this area created a valid, non-criminal reason for the immigration stops. As indicated above, this finding conforms to the law from this Court.

> Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.

440 U.S. at 663. Thus, the Court noted, its holding was not intended to "cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection . . . " 440 U.S. at 663, n. 26. This qualification merely reflects, however, the Court's longstanding distinction between investigatory and regulatory stops, although even the latter are subject to a balancing test under the Fourth Amendment.

The balancing test to be applied to these regulatory/safety seizures was supplied in *Brown v. Texas, supra*, and is not appreciably different than the balancing test applied in the immigration cases or in the special needs cases. In *Brown*, the defendant had been stopped by police while on the street because he looked suspicious, and he was then arrested for refusing to identify himself. The Court held that:

> [t]he reasonableness of seizures that are less intrusive than a traditional arrest, *see Dunaway*

> *v. New York . . . Terry v. Ohio* . . . depends " 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' " *Pennsylvania v. Mimms*, 434 U.S. 106, 109 . . . (1977); *United States v. Brignini-Ponce* . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interests, and the severity and interference with individual liberty.

443 U.S. at 50-51. This is hardly a blueprint for a standard allowing searches or seizures without cause. Indeed, each case cited by the Court involves the imposition of the general requirement that the search or seizure occur with some degree of cause.[7] As this Court stated in *Brown*, to ensure that the individual's expectation of privacy is not subject to discretionless invasion by police officers:

> the Fourth Amendment requires that a seizure must be based on specific, objective, facts indicating that society's legitimate interests require the seizure of the particular individual, or that

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[7] In *Dunaway v. New York*, 442 U.S. 200 (1979), an arrest and subsequent confession were found unconstitutional because the defendant had been arrested without probable cause. *Terry*, of course, requires some individual suspicion to ensure that a seizure does not run afoul of the Fourth Amendment. In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Court affirmed a conviction for firearm possession after the firearm was discovered during a lawful *Terry* pat down. Finally, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court reversed a conviction that occurred after a roving border patrol stopped a vehicle without cause or suspicion other than the occupant's apparent Mexican heritage. Reasonable suspicion was required to justify the stop. 422 U.S. at 881-82.

> the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

443 U.S. at 51.

Although *Brown*, like *Martinez-Fuerte*, discussed the possibility of conducting a search or seizure pursuant to a plan embodying neutral criteria, the case did not allow these types of intrusions to occur if their purpose was to investigate criminal activity. Indeed, in *Brown* the Court invalidated the conviction because the stop had not been supported by cause.

Subsequently, in *Sitz*, this Court found that cause was not a necessary predicate for the seizures of vehicles at a sobriety checkpoint. The stops in that case were solely for the purpose of a brief sobriety check, taking, on average, 25 seconds. 496 U.S. at 448. The City argues that these were criminal investigatory checkpoints, but sobriety checkpoints are more properly viewed as having a non-criminal investigatory purpose. Although drunk driving is a criminal offense, the Court emphasized that the state's interest was not in investigating criminal activity; rather, "the State's interest [was] in preventing drunken driving." 496 U.S. at 455. The need to keep imminently unsafe drivers off of the road is a non-criminal investigatory interest in the same way as inspecting cars to ensure safe vehicular operation is a non-criminal investigatory interest.

In determining the constitutionality of the sobriety checkpoints in *Sitz*, this Court utilized the balancing test of *Brown v. Texas, supra*, and focused on the State's interest in preventing drunk driving, the extent to which the

roadblocks further that interest, and the degree of intrusion the roadblocks pose for those stopped. 496 U.S. at 455. In doing so, this Court explicitly stated that it would not engraft onto the *Brown* balancing test the special needs analysis of *National Treasury Employees v. Von Raab, supra*. But, the City's argument that there is no need to show any individual cause or suspicion for any roadblock, provided it otherwise meets the balancing test of *Brown*, is wrong. *Sitz* does not authorize police stops which are designed solely or primarily for purposes of normal police investigation. *Sitz* did not create a "checkpoint exception" applicable where the checkpoint is designed to discover evidence of criminal activity. Given that this Court has never allowed a suspicionless search to be undertaken for criminal investigation, the Seventh Circuit was correct in limiting *Sitz* to its specific facts; sobriety checkpoints which have as their purpose traffic safety and not police investigation.

Sitz therefore conforms to the many cases cited above that differentiate between criminal investigatory searches and those which have other purposes. As the Seventh Circuit noted "the concern which lies behind the randomized or comprehensive systems of inspections or searches that have survived challenge under the Fourth Amendment is not primarily with catching crooks, but with securing the safety or efficiency of the activity in which the people who are searched are engaged." (Pet. App. 8a).

This Court has never authorized a general "checkpoint exception" to the Fourth Amendment. In *Chandler v. Miller*, 520 U.S. at 308, the Court reaffirmed that:

> Searches conducted without grounds for suspicion of particular individuals have been upheld, however, in "certain limited circumstances." *See Treasury Employees v. Von Raab*, 489 U.S. 656, 668 . . . (1989). These circumstances include brief stops for questioning or observation at a fixed Border Patrol checkpoint, *United States v. Martinez-Fuerte* . . . , or a sobriety checkpoint, *Michigan Department of State Police v. Sitz*.

Martinez-Fuerte and *Sitz* are properly recognized as two separate types of limited exceptions to general Fourth Amendment requirements and not as examples of an overarching "checkpoint" exception.

The City's argument that there should be a checkpoint exception appears to be based on its claim that motorists have a diminished expectation of privacy in their automobiles. This argument is flawed. First, a diminished expectation of privacy does not translate into no expectation of privacy. Nor could it, given that this Court has consistently recognized that "[a] citizen does not surrender all the protections of the Fourth Amendment by entering an automobile." *New York v. Class*, 475 U.S. 106, 112 (1986).[8] Because a person retains the protections of the Fourth Amendment while driving through Indianapolis, it is inappropriate to deviate from this Court's clear precedents demanding that cause exist to

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[8] The often mentioned "automobile exception" is not an exception to the cause requirement for searches or seizures. Instead, it is an exception to the warrant requirement, but only in circumstances where probable cause exists. *Maryland v. Dyson*, 527 U.S. 465 (1999); *California v. Carney*, 471 U.S. 386 (1985); *Carroll v. United States, supra.*

effect a search or seizure, unless the search or seizure is not for the purpose of criminal investigation.

Second, the argument that the diminished interest in privacy of automobile drivers allows for the creation of a checkpoint exception to the Fourth Amendment suffers from a conceptual problem as well. In *Brown*, this Court emphasized that the balancing test might be appropriate, not because of a diminished expectation of privacy, but if a seizure is "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of officers." 443 U.S. at 51. The significance of a diminished expectation of privacy comes into play, not in deciding whether the *Brown* test is to be used, but in determining "the severity of the interference with individual liberty" once it is determined that the *Brown* test is appropriate. *Id.* Therefore, before the question can be answered as to whether a diminished expectation of privacy is relevant, the question must be asked if it is appropriate to use the *Brown* test at all. And, the determinative factor in deciding whether or not to use the balancing test is whether the search or seizure is for purposes of criminal investigation.

B. This Court has repeatedly recognized that, because of the distinction between criminal investigatory seizures and searches and administrative/regulatory seizures and searches, a criminal investigatory motive may render a search or seizure invalid if it is performed without cause

It is, of course, true that "the subjective intent of the law enforcement officer is irrelevant in determining

whether that officer's actions violate the Fourth Amendment." *Bond v. United States*, ___ U.S. ___, 120 S.Ct. 1462, 1465, n. 2 (2000). However, as this Court noted in *Whren v. United States*, 517 U.S. 806, 811 (1996), this principle only applies to "police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred." If probable cause is present, the subjective intentions of the individual officers are not relevant. *Id., see also, Ohio v. Robinette*, 519 U.S. 33 (1996). The Court further explained that "the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes." *Whren*, 517 U.S. at 811-12. The City fails to come to grips with this Court's repeated rulings that a suspicionless search characterized as non-investigatory will be rendered unconstitutional if it is a programmatic subterfuge for criminal investigation. The purpose inquiry is one which must be made.

The importance of programmatic purpose was made clear in *New York v. Burger*, 482 U.S. 691 (1987), where this Court held constitutional a New York statute authorizing warrantless and suspicionless searches of auto junkyards. The Court noted that the statute had a clear regulatory purpose of seeking to ensure that the regulated businesses were legitimate and that the statute was not a " 'pretext' to enable law enforcement authorities to gather evidence of penal law violations." 482 U.S. at 716, n. 27. Although the Court recognized that the officer may discover evidence of a crime in the course of the regulatory searches, it held that, in the absence of any programmatic pretext, "[t]he discovery of evidence of crimes in the

course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect." 482 U.S. at 716.

In *South Dakota v. Opperman, supra,* a routine inventory search was conducted of the defendant's automobile after it had been impounded for traffic violations, and marihuana was found. This Court found that the warrantless and suspicionless search was a proper inventory search because "there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive." 428 U.S. at 376. The Court recognized that it was appropriate to look at the programmatic purpose in deciding whether the Fourth Amendment requires cause (for an investigatory seizure or search) or whether a suspicionless search (for inventory/regulatory seizures or searches) is permissible. Similarly, in *Colorado v. Bertine, supra,* an inventory search that disclosed narcotics was upheld because "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation." 479 U.S. at 372.

In *Michigan v. Clifford, supra,* the Court noted, in differentiating between an administrative search, based on the exigency of a fire, and a caused-based criminal investigatory search, that "[t]he object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined." 464 U.S. at 294. This, of necessity, requires that the court determine, among other things, "whether the object of the

search is to determine the cause of the fire or to gather evidence of criminal activity." 464 U.S. at 293.

The necessity of looking at the purpose for the search or seizure was also emphasized in *Texas v. Brown*, 460 U.S. 730 (1983), where the issue was whether evidence of criminal activity had properly been discovered as being in "plain view." The individual had been stopped at a driver's license checkpoint, and the police officer noticed a balloon in the driver's hand that appeared to contain narcotics. While the driver was looking in his glove compartment for his license, the officer, standing outside the car, shifted his position to obtain a better view of what was inside the car and noticed contraband. A plurality of this Court found that the plain view doctrine properly applied and the Fourth Amendment, therefore, did not preclude the seizure. However, then Justice Rehnquist, in his plurality opinion, noted that "the circumstances of this meeting between [Officer] Maples and [defendant] Brown give no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses." 460 U.S. at 743.[9]

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[9] The City and the United States argue that this element of *Texas v. Brown* is no longer valid since *Horton v. California*, 496 U.S. 128 (1990), did away with the "inadvertence" requirement under the plain view doctrine. This misses the point. Regardless of whether the item was discovered inadvertently or not, the plurality in *Texas v. Brown* recognized that it was necessary to look at the programmatic purpose of the roadblock to determine if the program itself was a pretext to discover evidence of criminal law violations.

This Court's case law therefore establishes two clear principles. First, a criminal investigatory search or seizure must be supported by cause, although one that is not directed to criminal investigation, like a regulatory, administrative, or safety seizure or search, need not be supported by cause, provided it satisfies a balancing standard. Secondly, and as a necessary corollary to the first principle, the programmatic purpose of the search or seizure must be examined to determine which Fourth Amendment standard applies. Thus, although the motive of the individual officer conducting the search or seizure is not relevant for Fourth Amendment purposes, the Fourth Amendment demands an examination of the overall purpose of the government program to determine if the search or seizure can properly be deemed to be regulatory or investigatory so a determination can be made as to whether the general requirement of cause can be eliminated. And, as the above citations make clear, this Court has not shrunk from the task of requiring lower courts to discern whether the search or seizure's primary purpose is to detect evidence of criminal activity or whether it is designed to serve a purpose that is not related to criminal investigation.

C. Allowing the propriety of the drug interdiction roadblocks in this case to be measured through the balancing test of *Brown v. Texas* would not only be unprecedented, but would seriously undermine the Fourth Amendment

The argument of the City and its *amici curiae*, stripped to its bare essentials, is that a checkpoint exception to the Fourth Amendment must be created because

drugs are such a serious concern in America today that there must be some leeway given to allow what they term to be relatively non-invasive seizures to stop drug trafficking. In addition to destroying any privacy interest that citizens have in their automobiles, the argument risks an even more dangerous precedent. In *Torres v. Commonwealth of Puerto Rico, supra,* the Court quickly dispensed with a similar argument raised by Puerto Rico to justify the constitutionality of its statute allowing it to search the luggage of travelers from the United States without individualized suspicion.

> Puerto Rico's position boils down to a contention that its law enforcement problems are so pressing that it should be granted an exemption from the usual requirements of the Fourth Amendment. Although we have recognized exceptions to the warrant requirement when specific circumstances render compliance impracticable, we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement.

442 U.S. at 474-74.

In *Richards v. Wisconsin,* 520 U.S. 385 (1997), this Court likewise refused to create a blanket exception to the "knock and announce rule" prior to police entry of a dwelling for entries involving felony drug investigations. The basis for the argued exception was the nature of the current drug culture, its reliance on weapons and the possibility of destruction of the drugs involved. The Court resisted the invitation noting that:

> [i]t is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness "is to preserve that degree of respect for privacy of persons and the inviolability of their property that existed when the provision was adopted – even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.' " *Minnesota v. Dickerson*, 508 U.S. 366, 380 . . . (1993) (Scalia, J., concurring).

520 U.S. at 392, n. 4. The Court found that it was problematic to create one exception since the exception can quickly obliterate the rule. 520 U.S. at 393-94.

The Court made the same point more recently in *Florida v. J.L., supra*, when it rejected an argument raised by both the State of Florida and the United States that the standard analysis under *Terry* should be modified to allow a search based on reduced cause if a gun was involved. "Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing." ___ U.S. at ___, 120 S.Ct. at 1379. Such an exception would be problematic for a number of reasons, the Court noted, including the fact that " 'the reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others,' thus allowing the exception to swallow the rule." ___ U.S. ___, 120 S.Ct. at 1380, *quoting, Richards v. Wisconsin*, 520 U.S. at 393-94.

The United States argues that this concern, which was also expressed by the Seventh Circuit, is misplaced

because, in the estimation of the United States, there will be no abuse if the police adhere to objective limitations on checkpoints. (Brief of United States at 27). The United States additionally contends that roadblocks would, of necessity, be limited because "[t]here is also a practical limitation both on what crimes have a sufficiently pervasive connection to the roadways to make it sensible to commit law-enforcement resources to checkpoints and what crimes can be policed effectively through plain view inspections or canine sniffs . . . " *Id.* at 28. However, the United States cannot mean that objective limitations sanction any and all searches and seizures. This would be the end of any requirement for individualized cause or suspicion under the Fourth Amendment. Yet, it is clear that the checkpoint exception argued for by the City and its *amici curiae* is not limited in any way other than by the product of the balancing test demanded by *Brown*. Under the City's argument, if the government entity's interests are high enough, and the privacy incursion is deemed to be small enough, then the seizure or search will be allowed if a court finds a connection between the seizure or search and the public interest. Adoption of the argument urged by the City will lead to all manner of seizures and searches unrelated to motor vehicles since there is nothing inherent in the balancing test which serves to limit it to motor vehicles.[10] The balancing test urged by the City

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[10] The possibilities are not limited by crimes which have a pervasive connection with roadways. Obviously, drunk driving has a pervasive connection with driving. However, drug smuggling does not have the same direct connection.

> Unlike operating while under the influence, trafficking in illegal narcotics involves a wide variety

would allow, for example, routine pedestrian stops and dog sniffs by drug detection dogs in neighborhoods known to have a large amount of drug trafficking. The possibilities are endless.

The argument of the City and the United States must be rejected here. The response to the problem of drugs in this country cannot be a retreat from the Fourth Amendment. This Court's jurisprudence on that point is clear – a criminal investigatory search or seizure must be supported by some quantum of cause. The seriousness of the concern here cannot be the reason to abandon this jurisprudence or, what are now exceptions to the Fourth Amendment could quickly become the rule.

> of transportation modes . . . Thus, narcotics interdiction is not inextricably connected with the public's use of the roads. . . .
>
> The nature of the harm caused by drug trafficking also differs from that caused by drivers operating while under the influence. The drug problem in the UnitedStates is certainly grave . . . However, the risk that narcotics trafficking poses to the public is not immediate, as is the risk posed by a person operating while under the influence.

Commonwealth v. Rodriguez, 722 N.E.2d 429, 434 (Mass. 2000). If the balancing test is the rule, there is no reason to limit the seizures to car situations.

D. The Indianapolis drug interdiction roadblocks are unconstitutional because their purpose is to seize drivers without suspicion in an attempt to discover evidence of criminal activity

As the Court of Appeals noted, "Indianapolis does not claim to be concerned with protecting highway safety against drivers high on drugs. Its program of drug roadblocks belongs to the genre of general programs of surveillance which invade privacy wholesale in order to discover evidence of crime." (Pet. App. 9a). Indianapolis is not claiming that drug interdiction roadblocks are necessary to remove unsafe drivers or unsafe vehicles. The City's purpose is not to regulate traffic. The roadblocks are, instead, criminal investigatory stops. The purpose of the stops is to discover probable cause to conduct searches to discover the unlawful possession of drugs. The ultimate goal is to detect drug traffickers. (Pet. App. 57a).

The City concedes that the principal purpose of the checkpoints is to interdict illegal narcotics. (Petitioner's Brief at 34). However, the City argues that the checkpoints have a valid secondary purpose of checking licenses and registrations and that this purported regulatory purpose makes the checkpoints valid under the balancing test of *Brown v. Texas*. Of course, this argument presupposes two circumstances which are not present here: 1) that there is actually, as a matter of fact, a valid secondary purpose to the roadblocks; and 2) that the test of *Brown v. Texas* is met with regard to a secondary, regulatory, purpose of checking licenses and registrations. Neither circumstance is present.

As indicated above, *see* note 1, *supra*, there is absolutely nothing in the record to indicate that the City of Indianapolis has any purpose for the roadblocks other than the detection of crime. It is true that licenses are checked during the stop, and persons are examined for signs of impairment. But, there is no evidence that these procedures are anything but parts of the scheme to keep drivers seized while attempts are made to develop probable cause to conduct searches for drugs. Accordingly, while the drivers are stopped, a drug-sniffing dog is deployed around each vehicle. Even if licenses and registrations have been checked and drivers have been examined, the drivers cannot leave, since as the policy proclaims in large type: "A DRUG DETECTION DOG WILL WALK AROUND AND EXAMINE *EVERY* VEHICLE STOPPED AT THE CHECKPOINT." (Pet. App. 54a). As the Seventh Circuit noted, "[l]eading a drug-sniffing dog around a car cannot be justified by reference to a desire to detect traffic violations, and so the use of the dog at the City's roadblocks shows – what is anyway not contested – that the purpose of the roadblocks is to catch drug offenders." (Pet. App. 11a).

The purpose of the roadblocks is therefore clear – to find and catch criminals. Nevertheless, the City argues that the test uniformly demanded by this Court's prior cases, which looks to the purpose of the seizure or search before determining whether cause is required or whether the *Brown* balancing test may be utilized, is too demanding and difficult a standard since it demands an inquiry into the mental state of those establishing the program. However, such a metaphysical inquiry is hardly necessary. It is clear in this case from the public statements

governing the creation of the roadblock program and the operation of the roadblocks themselves, that the purpose of Indianapolis' roadblocks is to look for drugs. In *Michigan v. Clifford*, as noted above, this Court indicated that the question of whether law enforcement authorities have a criminal investigatory or regulatory purpose is crucial for determining if a search can proceed without probable cause. The object of the search in *Clifford* was determined, not by looking into the thought processes of those involved, but by reaching reasonable conclusions based on the evidence before the Court. 464 U.S. at 649. ("Because the cause of the fire was then known, the search of the upper portions of the house, described above, could only have been a search to gather evidence of the crime of arson.") Similarly, no inquiry into mental state is necessary here. If the overriding purpose of the seizure or search is for purposes of criminal investigation, it must be supported by individual cause.

Even if there were facts which indicated that the City's drug roadblocks had a valid secondary purpose which was regulatory in some sense, the roadblocks would, at a minimum, have to satisfy the balancing test of *Brown v. Texas* as to this secondary purpose. To meet that test, the City must establish that license and registration issues are a serious public concern in Indianapolis, that the program is designed to address that concern, and that it does so in a way that does not unduly intrude on the privacy interest of the City's drivers. *Brown*, 443 U.S. at 50-51. The City has not only failed to make that showing on this record, it has not even attempted to do so except through conclusory references to traffic safety as a

"special need." (Petitioner's Brief at 31-32).[11] This cannot suffice, even under *Brown*. The checkpoints here simply do not have a valid secondary purpose.[12]

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[11] Key to the *Brown* test is a demonstration that the seizure or search is motivated by serious public concerns. 443 U.S. at 50-51. Unlike a sobriety checkpoint where societal interests and concerns may be presumed to be high, a governmental entity must present some evidence that public concern over license and registration issues justifies a roadblock. Otherwise, a court should find that, even under the balancing test, the seizure is not justified. A good example of this, and a situation with which the City should be familiar, is *Covert v. State*, 612 N.E.2d 592 (Ind.Ct.App. 1993). There, the defendant had been arrested for operating a vehicle while intoxicated after he was discovered at a roadblock which was designed to check licenses and registrations, as well as the lights, brakes, tires and mufflers of each car. In finding that the roadblock was unconstitutional the court noted that "[a]lthough the roadblock may have been designed to further a legitimate governmental interest, both the interest furthered and the degree to which the roadblock was designed to further it are not weighted in favor of the State." 612 N.E.2d at 596.

[12] There may be situations, although this case is not one, where there is a legitimate mixed-motive seizure or search that makes it is impossible to tell if the dominant purpose is to search for evidence of a crime or to advance some other regulatory or safety purpose. Even in that situation, however, there is no need to look into public officials' mental processes. Rather, such a mixed motive should compel the court to examine the government's actions to determine whether its criminal investigatory purposes increase the intrusiveness of the search or seizure in any way over what the government would otherwise have conducted in pursuit of its legitimate regulatory goals. If so, the search or seizure cannot be analyzed as a regulatory or other non-investigatory search or seizure. Instead, individualized suspicion is required and the *Brown* balancing test is inapplicable.

As the Court of Appeals recognized, the roadblocks operated by the City had only one purpose, to interdict drugs. The City has not attempted to show that any regulatory purpose is justified under the *Brown* standard. A seizure for the criminal investigatory purpose of interdicting drugs is not permissible absent cause.[13]

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[13] The holding of the Court of Appeals is hardly unique here and the many other cases reaching similar decisions demonstrates that courts readily comprehend the difference between a roadblock set up to investigate criminal activity and one which is set up for another purpose. *See, e.g., United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) [finding unconstitutional evidence seized at a roadblock established under pretext of ensuring compliance with traffic laws, but actually designed to interdict illegal drugs. The court noted that "[t]he Supreme Court has thus repeatedly emphasized the importance of keeping criminal investigatory motives from coloring administrative searches." 154 F.3d at 554. (Internal quotation and citation omitted)]; *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992) [although the roadblock checked licenses, its primary purpose was to use a drug-sniffing dog to determine if there were drugs present. The seizure of the drugs was deemed to be unconstitutional]; *Garcia v. State*, 853 S.W.2d 157, 159 (Tex.Ct.App. 1993) [conviction of motorist stopped at a checkpoint was overturned since the "[s]tatutes which allow law enforcement personnel to detain motor vehicles for the purpose of determining whether the driver has the required license do not allow 'fishing expeditions.' . . . Such general investigatory stops are not permitted by the federal constitution or the Texas Constitution."]; *Galberth v. United States*, 590 A.2d 990, 998 (D.C.App. 1991) [overturning conviction of a defendant who had been stopped at a roadblock which had as its primary purpose the detection of crimes related to "violence, drugs and guns." The court noted *Sitz* and *Martinez-Fuerte*, and stated that "[t]he Supreme Court has never upheld, by contrast, a police roadblock designed to promote general law enforcement purposes. Indeed, the Court has indicated that the police must

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have individual suspicion before they can seize someone for general law enforcement purposes." 590 A.2d at 998]. Even cases which have upheld the use of checkpoints have intimated that if the roadblocks were for the purpose of criminal investigation they would be unconstitutional. *See, e.g., United States v. McFayden*, 865 F.2d 1306 (D.C.Cir. 1989) ["It is possible that a roadblock purportedly established to check licenses could be located and conducted in such a way as to indicate that its principle purpose was the detection of crimes unrelated to licensing . . . Such a subterfuge might result in an infringement of Fourth Amendment rights, and some courts have so held."]; *LaFontaine v. State*, 497 S.E.2d 367, 369 (Ga.), *cert. denied*, 525 U.S. 947 (1998) ["a roadblock cannot be used as a subterfuge to detain citizens for the purpose of searching their automobiles . . . "]; *People v. Perez*, 51 Cal.App. 4th 1168, 1175, 59 Cal.Rptr.2d 596, 599 (1996) [Fish and game traffic checkpoint upheld only after court concludes that Fish and Game checkpoint is primarily regulatory in purpose, even though it is also operating as a search or inspection for violation of law.] *See also Commonwealth v. Rodriguez, supra*, 722 N.E.2d at 434-35 [declaring a drug interdiction roadblock unconstitutional under the Massachusetts Constitution and noting that it allowed the same type of general warrant search that James Otis and John Adams intended the state constitutional provision to prevent.]

In *Merrett v. Moore*, 58 F.3d 1547, 1551, n. 3 (11th Cir. 1995), *cert. denied*, 519 U.S. 812 (1996), although the roadblock was upheld, the court noted that it was leaving open the question of the constitutionality of a roadblock designed solely to interdict drugs. *But see, State v. Damask*, 936 S.W.2d 565 (Mo. 1996) [upholding validity of roadblock which was designed solely to interdict drugs.]

II. EVEN IF A BALANCING TEST IS UTILIZED TO ASSESS THE CONSTITUTIONALITY OF THE DRUG ROADBLOCKS, THE ROADBLOCKS ARE IMPROPER

The City's claim that the balancing test of *Brown* must be utilized here is therefore erroneous since it violates the principle that some cause must be present before a criminal investigatory seizure occurs. However, even if *Brown* is used in this case to analyze the criminal investigatory roadblocks, the roadblocks are unconstitutional.

Brown requires that, in order to determine the validity of the search or seizure, a court must weigh the gravity of the public concerns served by the search or seizure, the degree to which the search or seizure advances this interest, and the severity with which the search or seizure interferes with individual liberty. 443 U.S. at 50-51. In analyzing the last prong of the balance, this Court noted in *Sitz* that the interference with liberty must be judged from both the standpoint of the " 'objective' intrusion, measured by the duration of the seizure and the intensity of the investigation" and the "subjective intrusion on the motorists." 496 U.S. at 452-53. The subjective intrusion is measured by the roadblock's potential for generating fear and surprise in law-abiding motorists. 448 U.S. at 453.

From a subjective standpoint, the roadblocks here are markedly different from those in *Sitz* or in *Martinez-Fuerte* because of a number of factors which increase the roadblock's potential for generating fear and surprise. First, is the addition of the drug-sniffing dog. Although a dog sniff may not be a search for Fourth Amendment

purposes when possessions are being sniffed, *United States v. Place*, 462 U.S. 696 (1983), this does not mean that a dog sniff does not markedly increase the potential for generating fear and surprise, especially when a person perceives that he or she is being sniffed. *See, e.g., B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1266 (9th Cir. 1999); *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 478-79 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983).[14] An innocent person may not have anything to fear from a sobriety checkpoint which, as in *Sitz*, only involves a brief examination by an officer; by contrast, having to depend on the uncertain reaction of an animal, and how that reaction is interpreted by police, can be extremely alarming.[15]

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[14] The issue at bar is not whether a dog sniffing the exterior of a car in which the driver remains is a search for Fourth Amendment purposes. Even if it is not, it is clear that this is markedly different than an unattended baggage sniff by a dog, and it is not unrealistic to conclude that innocent persons may react with fear and surprise when they are in their car being circled, not only by law enforcement officers, but by a dog trying to detect unknown odors.

[15] This is especially true given the apparent uncertain accuracy of "dog sniffs" in suspicionless drug interdiction efforts. Drug detection dogs often are less accurate when the dog sniffs survey a random population as opposed to when the police also use their expertise to target the dog more narrowly. Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KENTUCKY L.J. 405, 430-431 (1996-97). For example, during random stops in the Florida roadblocks which were the subject of *Merrett v. Moore, supra*, 1,450 vehicles were sniffed, the dogs alerted to 28 vehicles, and only one person was arrested for narcotics possession. 58 F.3d at 1549. Additionally, "the dogs scratched several cars; and one person was bitten by a dog." *Id.* In *Doe v. Renfrow*, 475 F.Supp.

Moreover, the drug checkpoints in Indianapolis constitute a much stronger showing of police presence than the sobriety checkpoint in *Sitz* or the initial stop at the immigration checkpoint in *Martinez-Fuerte*. As the vehicle pulls up there may be as many as 30 officers present. The stopped cars are met by a team of officers. (Pet. App. 57a). One officer takes the license and registration to check it. A drug-sniffing dog is led around the car. At the same time, a plain view inspection occurs. The policy also allows for searches by consent. (Pet. App 53a). The policy therefore focuses an intense police effort on each vehicle. In *Martinez-Fuerte*, the stops were deemed to be permissible because they could not be considered to "be frightening or offensive because of their public and relatively routine nature." 428 U.S. at 560. Although the stops here are public, they are not routine, and they certainly pose the potential of being alarming, even to innocent persons.

From an objective standpoint, the City's drug interdiction stops are also different from the drunk driving and immigration checkpoints. The parties stipulated that the temporal goal for the checkpoints is five minutes or less, a marked increase over the 25 seconds that the

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1012 (N.D.Ind. 1979), *aff'd in part and remanded in part*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981), a random sniff of more than 2,700 junior and senior high school students resulted in fifty indications by the dogs that drugs were present on the students although only 17 students were found in possession of contraband. 451 U.S. at 1023-24 (Brennan, J., dissenting from denial of *certiorari*). Statistics like this certainly explain why an individual would feel a heightened increase in fear and surprise if they were met with a dog sniff as part of a roadblock.

drunk driving roadblocks took in *Sitz*, 496 U.S. at 448, and reflects the increased activity featured in the roadblocks – drug-sniffing dogs, plain view inspections, checking of licenses and registrations, and potential seeking of consent to searches. Although the referrals to the secondary inspection areas at use in one of the roadblocks in *Martinez-Fuerte* could take three to five minutes, 428 U.S. at 547, most of the immigration stops were extremely brief, perhaps even allowing for "rolling stops" of vehicles. Furthermore, the objectivity of the intrusion must be measured not just by time, but by the intensity of the investigation. *Sitz*, 496 U.S. at 452-53. The investigation here, involving multiple officers and dogs, is intense and must be recognized as significantly impinging upon the motorists' privacy interests. Because they are more intrusive than the roadblocks in either *Sitz* or *Martinez-Fuerte*, the roadblocks here are unconstitutional even under the balancing test of *Brown*.

CONCLUSION

This Court should therefore affirm the judgment of the court of appeals.

Respectfully submitted,

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